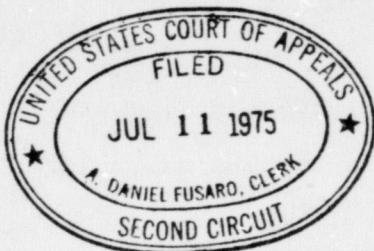


***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**



75-2051

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 75-2051

UNITED STATES OF AMERICA,

Respondent,

—against—

JOHN FRANZESE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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FOR THE SECOND CIRCUIT

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-against-

JOHN FRANZESE,

Defendant-Appellant.
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PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court of the Eastern District of New York, per Mishler, Ch. J. entered on or about March 12, 1975, denying a motion to vacate the judgment and commitment dated April 17, 1967 on the grounds that the convictions were obtained by false and perjurious testimony in violation of appellant's rights pursuant to 28 U.S.C. Section 2255.

QUESTIONS PRESENTED

1. Did the Court below err in denying Section 2255 relief, and did it apply erroneous and irrelevant legal procedures and standards to determine whether appellant should have been granted a new trial and whether appellant was entitled to an evidentiary hearing?

STATEMENT OF FACTS

The appellant, John Franzese, was found guilty, after trial, (Indictment # 66 Cr. 161) on three substantive counts, and on a conspiracy count relating to bank robberies. The judgment was affirmed on appeal. United States v Franzese, 392 F.2d 954 (2nd Cir. 1968). Appellant is now serving a fifty-year prison sentence and is presently confined at the Leavenworth Penitentiary, Leavenworth Kansas.

The government's case at trial^{*/} rested almost entirely on the testimony of four confessed participants in the bank robberies - Smith, Parks, Zaher and John Cordero. The appellant was cast by the quartet of bank robbers in the role as the behind-the-scene operator of the Smith-Park-Zaher-Cordero bank robbery ring.

At the previous trial of one Anthony Polisi, Smith, Parks and Zaher depicted Anthony Polisi, owner of the Acqueduct Motor Inn as the mastermind of the ring. At the Franzese trial, Franzese was made the mastermind. The switch in leadership was alleged to have been made between July 19, 1965 and July 22, 1965 at a meeting at the Acqueduct Motor Inn. Present at the meeting were Smith, Parks, Zaher, Cordero and Polisi, appellant,

^{*/} The statement of the trial facts is adopted from U.S. v Franzese, 392 F.2d at pp. 955-958.

2
Matera, Crabbe and Florio.

Another meeting was alleged to have occurred towards the end of July. There Franzese announced the acquisition of plans of five banks including the Queens and Oceanside banks, the latter robberies which were charged in substantive counts of the indictment. Getaway routes and the location of the cars in which the robbers would make their getaway was disclosed.

After a dress rehearsal conducted by Florio in which the getaway driver, Ann Massaneo (a named defendant), was introduced, Cordero, Parks and Smith robbed the Queens County Federal Savings and Loan Association on July 30, 1965. Ann Massaneo was named as the driver of the getaway car.

On August 13, 1965, the same group robbed the United States Savings and Loan Association in Oceanside, Long Island.

THE ROLE OF ELEANOR CORDERO
AS REVEALED AT TRIAL.

An F.B.I. report given to defense counsel at trial had reported John Cordero as stating that his wife, Eleanor Cordero, had driven one of the switchcars following the Oceanside robbery of August 13, 1965.

On cross-examination Cordero denied having said this, although he stated that his wife innocently participated in the robbery.

Defense counsel attempted to call F.B.I. Agent Murphy in order to obtain the name of the confidential informer whose statement had formed the basis of an arrest warrant for Eleanor Cordero. Defense counsel argued at trial that this was necessary to enable them to demonstrate a further reason for Cordero's cooperation with the government. The court declined disclosure.

Early in September, the activities of the robbers were transferred to Denver and Salt Lake City. Eleanor Cordero accompanied John Cordero, Parks and Smith to Denver, Colorado. The venture in the west resulted in two more robberies.

At the time of Eleanor Cordero's arrest at her home in Beth LI, Connecticut, a plaid suitcase containing over \$10,000 in cash was seized. In a separate action, Cordero v United States, 66 C 1099, the cash seized was returned to her, except some \$200 in twenty-dollar bills identified as having come from the Salt Lake City robbery. The prosecutor, in an affidavit, stated, except for the \$200. "the government has no evidence to show the remaining monies are not those of the aforesaid Eleanor Cordero, and has no other claim for this money from any other party".

MOTION FOR A NEW TRIAL BASED
UPON PERJURED TESTIMONY

On or about November 15, 1974, the appellant moved in the District Court for an order, pursuant to

Title 28 U.S.C. Section 2255, setting aside the judgment of conviction rendered on April 17, 1967, on the grounds that the testimony of the main government witnesses were false and perjurious and of such material nature as to be the basis of the verdict and that such perjured testimony was known to the government. The grounds for the motion were based upon the sworn statements of Eleanor Cordero.

THE ELEANOR CORDERO
AFFIDAVITS*/

In a series of affidavits Mrs. Cordero revealed the following facts: Eleanor and John Cordero first met in late June, 1965. At that time, he told her or gave her the impression that his source of income was his ownership in a carwash. (A-13)^{**/} Subsequently, they became intimate and were married. The first indication that she had that he was robbing banks was in early July, 1965. On that occasion, he came into a motel room where they were staying and dumped a large amount of cash on the bed. (A-13)

She also met James Smith, also known as Smitty, and Richard Parks. John Cordero, along with Charles Zaher (whom she knew as "Blackie") were committing bank

*/ Eleanor Cordero submitted to the Court three affidavits, dated respectively, October 19, 1974, January 15, 1975 and March 10, 1975, which are reproduced in the appendix.

**/ "A" - refers to the printed appendix.

robberies. (A-15)

On or about July 14, 1965, Parks and Smith went to Puerto Rico under assumed names. John Cordero and Mrs. Cordero drove them to the airport. Prior to driving them, they rented two rooms at the Kew Gardens Motor Inn. In the latter part of July, 1965, Eleanor Cordero received a postcard from Smitty, from Puerto Rico postmarked July 19, 1965. After receiving the postcard, but before Smitty returned, John and Eleanor Cordero went to Baltimore, Maryland and did not return to New York for four or five days. (A-12, 14)

On July 30, 1965, the group including Mrs. Cordero robbed the Kew Gardens branch of the United States Savings and Loan Association at 75-21 Main Street. Mrs. Cordero drove the getaway car which was stolen in the Bronx by Richie Parks. After the robbery, the group split up, Mrs. Cordero got in her car with John who was carrying the money, and Richie and Smitty drove off in the stolen car. They then all proceeded to Richie's apartment where the money was split up. There was no share withheld from anyone else. There was an argument over Eleanor Cordero's share of the proceeds because she was John's woman but nevertheless she got an equal share. (A-14)

John and Eleanor Cordero set August 13, 1965 as the date on which they would get married. That was also the date that they robbed the Oceanside Bank. There were three automobiles involved in that robbery: (1) THE ACTUAL GETAWAY CAR - Actual getaway car from the bank, was a black Riviera, stolen from the Kew Motor Inn. (A-92) Mrs. Cordero

drove that automobile; (2) ELEANOR CORDERO'S SWITCHCAR - After leaving the bank in the Riviera she dropped Parks and Smitty off and then proceeded to her car which she had left parked with her daughter Stephanie inside; (A-92) (3) PARK'S and SMITTY'S SWITCHCAR - The automobile that Parks and Smitty used as their "switchcar" was stolen from the Tavern on the Green. The car stolen from the Kew Motor Inn (the actual getaway car) had stolen plates on it. Prior to the robbery, Mrs. Cordero drove Parks to a parking lot in Rockville Centre, Long Island where he stole the license plates. The parking lot was across the street from a garden apartment. The parking lot was located across the street from 402 Merrick Road, Rockville Centre, Long Island. (A-92-93) Later that day John and Eleanor were married at the courthouse on Sutphin Boulevard in Queens, New York. (A-14)

Jan Cassaneo never participated in either of these robberies. Her name was used in order to divert the authorities' attention from Eleanor Cordero and also to tie her in with Tony Polisi. (A-17)

In early September of 1965, Eleanor and John met Richie, Smitty and Carol Salzo in the Howard Johnson Motel in Chicopee, Massachusetts. (A-15) John, Smitty and Richie then robbed the bank in Holyoke, Massachusetts. Eleanor picked John up after the robbery. Sal Polisi did not participate in the robbery. (A-15)

In the middle of September, 1965, John, Smitty and Pichie decided to rob some banks out west because New York was too hot. (A-15) First they went to Denver, Colorado. Eleanor Cordero and Carol Salvo were with them. They rented rooms and cars under assumed names. The gang had no idea what bank they would rob and went out and cased a number of them. In Denver they robbed a bank but got only \$300. They then went to Salt Lake City, Utah. (A-15)

In Salt Lake City they robbed a shopping center for \$35,000. After the money was split, John and Eleanor Cordero went to Las Vegas where they gambled for a few days. (A-15)

On October 1, 1965 John and Eleanor Cordero were arrested by F.B.I. Agents at their home in Beth El, Connecticut. At the time of her arrest, Eleanor's daughter, Stephanie Cordero, was at home. Eleanor was taken to the hospital and was not allowed to see her daughter. Subsequently, she learned that on the day of her arrest her daughter, Stephanie, was driven to a foster home by the arresting agents, where she remained during Eleanor's incarceration. (A-66)

When Eleanor was arrested the government already had information that she was involved in the bank robberies and that she was the driver of the getaway car. John Cordero

in his negotiations with the government, was able to make a deal where Eleanor was cut loose from the case.

(A-66) It was arranged that Ann Massaneo would be substituted in Eleanor Cordero's place as the driver of the getaway cars. When John Cordero told Eleanor of the arrangements, Eleanor asked him if Ann Massaneo looked like her. Eleanor was told that it doesn't matter what she looks like "we're going to get a deal". (A-66)

John Cordero told Eleanor that she was even identified by an eye-witness to the robberies but that was of little consequence.

No agent or United States Attorney ever asked Eleanor Cordero to explain her actions or even say a word about her knowledge of the robberies. Eleanor was never prosecuted or named as a co-conspirator or a co-defendant. (A-67)

The same procedure was followed with the money that was found at the time of Eleanor's arrest. At first the government agents stated that this was the bank robbery money. But, after the deal was made with her husband, most of the money was returned to Mrs. Cordero without any question. This was despite the fact that some of the money given to her actually had the same serial numbers of the bills that were reported stolen. Her story, that the money was given to her by her former husband for her daughter, was

accepted without question. (A-67) Not only had her husband bargained her out of the robberies, but he was able to get her the actual proceeds from the robberies.

Before Eleanor Cordero's arraignment, Mr. Gillen accused her of being a participant in the robberies. (A-67) Eleanor Cordero never denied the fact to Mr. Gillen, but only refused to speak to him until she was able to consult an attorney. At no time, however, did Eleanor Cordero ever deny her participation in the robberies to any agent of the Federal Government. Neither Mr. Gillen nor any other United States Attorney ever asked her to do so. Even after the substitution of Ann Massaneo for her, she was never asked to deny her involvement. Much to her surprise and relief after her arrest, she was never viewed by any eye-witnesses. (A-67)

During the months following her arrest, from October, 1965 to January, 1966, Eleanor met with her husband on numerous occasions in West Street and in Mr. Gillen's office. It was during this time that John told Eleanor that he, Richie, Smitty and Blackie, concocted a story to involve the Polisis as the masterminds of the robberies. (A-16) Their sole purpose in this was to secure consideration on sentence. The only persons really involved in the robberies were herself, John, Richie, Smitty and Carol Salso. (A-16, 17)

Some time during the Polisi trial in January, 1966, John told her that he, Smitty, Richie and Blackie had found out that the only consideration that they were receiving from the government was to the extent that they would get only twenty-five years and not one hundred and twenty-five years which they faced. This is when they devised the scheme to implicate John Franzese. He was selected because he was associated with the "territory" near the Acqueduct Motor Inn. The sole purpose of implicating him was to receive favorable consideration from the government on the sentence. (A-17)

Eleanor Cordero states categorically in her affidavits that during the period in question she never met John Franzese, nor did John Cordero even mention his name in connection with any of the robberies. (A-17) Mrs. Cordero also states that no floor plans were used in the robberies and that all escape routes were devised in advance by Richie Parks and that the cars involved were stolen by Richie Parks. No outside party ever provided stolen cars for John, Smitty or Richie to use in the robberies. John, Smitty and Richie selected the banks at random without aforethought. There was no behind-the-scenes mastermind. (A-17)

After the Oceanside robbery, the group decided to destroy the travelers checks since they were numbered and

"hot". They decided to dispose of them in a manner which would "cool off" Kew Gardens and divert attention away from the Kew Motor Inn. (A-18) They decided to take the checks and leave them far from Kew Gardens or Long Island. They went to Yonkers, to the Cross County Shopping Center to a bar known as "Wilsker's". Richie went in the bar first and remained there. John and Eleanor Cordero entered later and took a table and pretended that they didn't know Richie. John and Eleanor left the checks on the floor, in an attache case, at the table where they were sitting and left. Parks stayed at the bar and watched to make sure that the checks were found. After Richie established that the checks were found he left and met John and Eleanor at the far end of the shopping center. Richie got in his car and left and John and Eleanor got in their cars and went home. (A-18)

In sum, Eleanor Cordero states that to her knowledge all the testimony involving John Franzese and implicating him in the conspiracy to commit the bank robberies was false. He did not aid in the planning or execution of any of them, nor did he share in the proceeds. The story involving him was devised by John Cordero, James Smith, Richard Parks and Charles Zaher to secure favorable treatment from the government on their sentencing for the bank robberies that they had planned, committed, and pleaded guilty to. Ann Massaneo played no part in the

robberies and any role that she was alleged to have played was in fact played by Eleanor Cordero. (A-16-19, 66-69)

SUPPORTING AFFIDAVITS

In addition to the three affidavits submitted to the court by Eleanor Cordero, additional affidavits were submitted which corroborated Eleanor Cordero's statements.

(a) Affidavit of Irwin Blye, sworn to the 15th day of January, 1975. (A-65)

Irwin Blye, a licensed private investigator, New York State License Number 13665, stated that on January 2nd, 1975, he was retained by the wife of John Franzese to conduct an investigation relative to locating any person who could be able to corroborate the statement given by Eleanor Cordero, to wit, that the incident concerning the bonds and travelers checks occurred at a restaurant-bar known as Wilsker's. Through investigation, he was able to locate the former owner of Wilsker's, Mr. & Mrs. Abraham Wilskers, at their present residence in Fort Lauderdale, Florida. Mrs. Abraham Wilskers stated to Mr. Blye that around 1965, in the warm weather, she found an attache case in their restaurant which contained valuable bonds and checks which she possibly believed

bore the name "American Express". She was certain that there was no cash in the attache case and that the bonds and other items were turned over to the authorities. (A-65)

(b) Affidavit of Stephanie Cordero, sworn to the 15th day of January, 1975. (A065) Stephanie Cordero is the daughter of Eleanor Cordero. On or about October 1, 1965, the date that her mother was arrested in their home in Beth El, Connecticut, she was driven by two F.B.I. Agents to a foster home. While being driven, the F.B.I. Agents asked her if she knew that her mother was a bank robber and had participated in several bank robberies. They also told her that they knew that her mother and father had driven her to a location in their car and that her mother and father left the car and entered another car leaving Stephanie in their car. They further told her that they knew that she had waited in the back of their car for two hours until her mother and father returned in a different car. They told her that they knew all about her mother and how Stephanie hid in the back of the car as her father drove off. (A-65)

(c) Affidavit of Carmine J. Pepe, sworn to the 23rd day of December, 1974. Carmine Pepe, stated that during the summer of 1971, he met Eleanor Cordero at the Merry-Go-Round Bar on Queens Boulevard and 46th Street, Sunnyside, Queens, New York. The meeting was the result of an inquiry by Jack Eseveroff, Esq., who was acting on

behalf of John Franzese, to discover the whereabouts of Eleanor Cordero in an attempt to obtain a statement from her. (A-63-64)

Accompanied by a Carmine Delgado, Mr. Pepe attempted to interview Mrs. Cordero. Mrs. Cordero refused to talk to them. She stated to them that she would not talk because her husband, John Cordero, had told her that John Franzese was responsible for the death of her late husband, Ernie "The Hawk" Rupolo.

GOVERNMENT'S AFFIDAVITS
IN OPPOSITION

In opposition to appellant's motion, the government submitted several affidavits and documents, which were not part of "files and records of the case".

(a) Affidavit of Danny O. Coulson, sworn to the ____ day of March, 1975. Danny Coulson stated that he is a Special Agent of the Federal Bureau of Investigation and that on October 1, 1971, he and Special Agent T. Barry Goas, interviewed Eleanor Cordero, and that a FD-302 summarizing this interview was prepared by Agent Goas and himself. A copy of the FD-302 was annexed to the affidavit. (A-78-84)

The report stated that Mrs. Cordero had informed the Agents that the two men who approached her at the Merry-Go-Round Bar had stated that they wanted to get Sonny out on the street and were willing to do anything

to get him out. Mrs. Cordero was allegedly offered \$50,000 to come forward and state that her husband had lied in court to frame Sonny Franzese.

(b) An F.B.I. Report which stated that the automobile used in the August 13th robbery was stolen from the parking lot of the Kew Gardens Motor Inn on August 2nd or 3rd, 1965. (A-85-87)

(c) Affidavit of Michael J. Gillen, sworn to the 28th day of February, 1975. Michael J. Gillen stated that he was the Assistant in charge of the case of United States of America against John Franzese and that he had been shown copies of a report dated March 3, 1966 prepared by Special Agent Edward J. Putz. That report indicated that he had advised Agent Putz that Eleanor Cordero had denied that she was involved in any bank robberies. Mr. Gillen stated that he had no independent direct recollection of the denials but that he has no reason to believe that his communication to Agent Putz was inaccurate in any way. (A-88-91)

DISTRICT COURT

The District Court denied appellant's application for a new trial and in the alternative for a hearing.

POINT I

THE COURT BELOW ERRED IN DENYING
SECTION 2255 RELIEF, AND APPLIED
ERRONEOUS AND IRRELEVANT LEGAL PRO-
CEDURES AND STANDARDS TO DETERMINE
WHETHER APPELLANT SHOULD HAVE BEEN
GRANTED A NEW TRIAL AND WHETHER
APPELLANT WAS ENTITLED TO AN EVI-
DENTIARY HEARING.

A. The Corderos' Complicity With the Government:

The following facts thoroughly put to rest any claim by the government that it was unaware of Eleanor Cordero's involvement as an active member of the robbery ring.

On October 1, 1965, Eleanor Cordero is arrested at her home in Bethel, Connecticut. ^{*/} The government has a warrant for her arrest. Based upon the credible information of a confidential informant, there is probable cause to believe that Eleanor Cordero and John Cordero have committed numerous bank robberies. (A-66-68)

Eleanor Cordero's daughter, Stephanie, is at home at the time of the arrest. Stephanie is taken away from her mother by two F.B.I. agents, and she is taken in the back seat of an automobile to a foster home. En route she is told that her mother has robbed several banks and that the agents know that Stephanie remained in the back seat of her mother's car while her mother and father were robbing banks. (A-69)

*/ The present tense has been used in this section as the means of best presenting the overall facts and the role the government played in the switch of Ann Massameo for Eleanor Cordero.

Eleanor Cordero is taken to the offices of the United States Attorney for the Eastern District of New York. There, she is interviewed by Assistant United States Attorney Michael Gillen. Eleanor Cordero has not yet been arraigned on the bank robbery charge. Mr. Gillen accuses her of driving the getaway car. Eleanor Cordero refuses to answer any questions and demands to see her lawyer. (A-67)

Eleanor Cordero is never arraigned on the charges. (A-16)

From October 1965 to January 1966, Eleanor Cordero visits her husband who is being prepared as a witness by Mr. Gillen, in Mr. Gillen's office. Eleanor Cordero speaks to her husband in Mr. Gillen's presence. Mr. Gillen does not question her. He does not ask her about the robberies; he does not ask her what her role was. He does not ask her to deny her involvement. (A-66-67)

During these visits, John Cordero tells Eleanor that he and the others were going to concoct a story about the Polisis so that he and the others could receive consideration on sentence. (A-16) Some time later, again in Mr. Gillen's office, after the Polisis are convicted, John Cordero tells Eleanor Cordero that things were not working out the way they had planned and that he was going to get twenty-five years. John tells Eleanor that they had to come up with something better. He tells her that they have concocted a new story. This time the story will involve

John "Sonny" Franzese. (A-16-17) He tells her not to worry, that she was going to be cut out of the case and that an Ann Massaneo will take her place. John tells her that Massaneo will fit in just fine because she is already associated with the territory near the Acqueduct Motor Inn. (A-17) Eleanor tells him that she doesn't even look like Ann Massaneo. He tells her not to worry, everything has been worked out. All this he tells her in Mr. Gillen's office. (A-66)

Indictment Number 66 Cr 161 is handed up and Eleanor Cordero is not named as a defendant, or even as an unindicted co-conspirator. Ann Massaneo is named a co-defendant.

Again and again, Mrs. Cordero visits her husband at Mr. Gillen's office. Mr. Gillen is preparing his case against appellant, with Ann Massaneo now playing the role of Eleanor Cordero. Not once during these several visits is one single question posed to Mrs. Cordero concerning her "non-involvement". At no time does Mr. Gillen ask her to deny the role for which she was arrested. (A-66-67)

On the eve of trial, Ann Massaneo was severed from the case. The government consents. (A-60)

In a separate action, 66 C 1099, Eleanor Cordero petitions the court for the return of the \$10,000 taken from her at the time of her arrest. She has no difficulty in obtaining the money. Some of the bills given to her have the

same serial numbers as those reported stolen. (A-67)

At the trial of the appellant, John Cordero testifies that appellant was the mastermind of the bank robberies, that he provided the maps, floor plans and getaway cars used in the robberies. (A-67) Eleanor Cordero knows that this is not so. No maps, or floor plans were ever used in the robberies. All the banks were picked at random with minimal preparation. All the getaway cars were gotten by the immediate members of the gang. Appellant had absolutely nothing to do with the robberies; he never supplied any floor plans, maps or getaway cars. (A-15-19) Eleanor Cordero knows all this but she remains silent. She also knows that her husband has made arrangements with the government to have her removed from the case.

John Cordero testifies at trial that the crucial meeting in which the operations of the bank robbery gang shifted to appellant's control occurred between July 19 and July 22, 1965. On July 19th Parks and Cordero are still in Puerto Rico. John and Eleanor Cordero leave New York, well after the 19th. They do not return to New York until some time well after July 22nd. There was no meeting. (A-14)

At trial, John Cordero testifies that a split of money took place after the Oceanside robbery. He testifies that Ann Massaneo took part, along with Nick Potere, Whitey Florio and Tony Polisi, in a dispute over the split of the take from

the Oceanside robbery. Eleanor Cordero knows that this was not so. She knows that the split concerned herself, Parks and Smith and Zaher. They did not want her to get a share since her husband was already getting a split. Eleanor argued that she was the driver of the getaway car and therefore she was entitled to a share, despite what her husband was getting. Eleanor was able to get a share, but as a result she was never again allowed to drive any getaway cars. (A-14-15)

At trial, John Cordero testifies that the travelers checks which came from the Oceanside robbery were dropped off at a bar in Yonkers, at the direction of appellant, so that they could be disposed of by a fence. Cordero testifies that originally they went to the Red Coach Grill in Yonkers, but could not get in the Red Coach Grill because they were not properly dressed. They then proceeded to another location, but quite conveniently John Cordero can not remember the name of that place. (A-54-55)

At trial, Mr. Gillen states to the court that the incident concerning the bonds and the travelers checks might have occurred at a place known as the "Red Coach Grill". He further states that "that's how they (bonds and travelers checks) came into our possession." (732 of the Trial Record) (A-54)

Mrs. Cordero states quite a different version of the

"Wilsker's" incident that her husband gave at trial:

After the Oceanside robbery, the robbers decided to destroy the travelers checks, since they were numbered and "hot". They decided to dispose of them in a manner which would "cool off" Kew Gardens, since the gang originally used the Kew Motor Inn. They decided to take the checks and leave them far from Kew Gardens or Long Island. They went to the Cross County Shopping Center in Yonkers, to a bar known as "Wilsker's". Richie Parks went in first, John Cordero and Eleanor Cordero then entered and took a table and pretended that they didn't know Parks. John and Eleanor left the checks on the floor in an attache case. Then they left. Parks stayed behind to make sure that the checks were found. After Parks saw that the checks were found, he left and met the others at the far end of the shopping center. (A-18)

Mr. Edelbaum, Franzese's lawyer at trial, argues to the jury in summation that despite all the denials, Mrs. Cordero was involved in the robbery (Trial Record-3954-3955). Faced with John Cordero's denials, Mr. Edelbaum is unsuccessful and the jury believes John Cordero's denials.

The jury convicts appellant and the court imposes a fifty-year prison sentence.

On July 1, 1971, on motion of the government, the indictment as to defendant Ann Massaneo is dismissed. (A-60)

B. Standards for a New Trial:

At the outset, it should be made clear, that, although

the sworn statements of Eleanor Cordero contain new evidence, the motion below is brought pursuant to 28 U.S.C. Section 2255, and was not a motion for a new trial based upon newly discovered evidence (Rule 33 of the Federal Rules of Criminal Procedure).

Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." Mooney v Holohan, 294 U.S. 103, 112; Pyle v Kansas, 317 U.S. 213; Giglio v United States, 405 U.S. 160. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, "a new trial is warranted if the evidence is merely material or favorable to the defense." United States v Kahn, 472 F.2d 272, 287, (2d Cir., 1973), cert. den. 1 U.S. 982 (1973); United States v Rosner, ___ F.2d ___ (2d Cir., Slip Opinion 523, September Term, 1974). If, however, the government's suppression is "inadvertent" a new trial is required only if there is a "significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction". United States v Kahn, supra; United States v Miller, 401 F.2d 825, 832 (2d Cir., 1969); see United States v Keogh, 391 F.2d 138, 147-48 (2d Cir., 1968).

C. Infirmity of the Proceedings in the Court Below:

Although the sworn statements of Eleanor Cordero contain new evidence, the motion below was based upon the government's use of known perjured testimony and suppression of material evidence and was brought pursuant to Title 28, U.S.C. Section 2255. The motion was clearly not a motion for a new trial based upon newly discovered evidence under Rule 33, Federal Rules of Criminal Procedure. Therefore, the two year statute of limitations is wholly inoperative in the case at bar.

The court below, in hearing the motion, adopted highly irregular procedures in determining its merit. Rather than granting the appellant a hearing, the court deviated from the mandated procedures of the statute and "invited" the United States Attorney to submit its evidence, not at a hearing, but in the form of affidavits. This was despite the clear wording of the statute that:

"Unless the motion and the files of the records of the case conclusively show that the petitioner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

Nowhere did the court in its opinion state that the "motion and files of the record of the case" conclusively show that appellant was entitled to no relief. Instead, the court denied appellant's application on the basis of affidavits

and other documents submitted by the government, which were not part of the files of the record of the case. As this court has made clear in Taylor v United States, 487 F.2d, 307 (2nd Cir., 1973) affidavits submitted by the government are not part of the "files and records of the case" which can be taken to "conclusively show that the petitioner is entitled to no relief". This principle was established by the Supreme Court as long ago as Walker v Johnson, 212 U.S. 275 (1941) and Wally v Johnston, 316 U.S. 101 (1942).

D. Decision of the Court:

It is significant to note what the court below did not do - it did not make a finding of fact that the government did not use perjured testimony to obtain the conviction of the appellant. Rather, the court held that it:

"...is satisfied that the testimony of Mrs. Cordero, outlined in her affidavit, would have little, if any, effect on the credibility of Mr. Cordero and the other government witnesses. Her testimony would not produce a different verdict in the event of retrial."

We submit, that the court below applied an erroneous legal standard in judging whether a new trial was required. Where suppression is deliberate, as in the case at bar, it is of little moment whether Mrs. Cordero's testimony would or would not have produced a different verdict in the event of a retrial. The question that should have been ascertained

is whether her testimony was 'material or favorable to the defense.' United Stats v Kahn, 272 F.2d 272, 287 (2nd Cir., 1973); United States v Rosner, supra, and cases cited therein.

Even under the incorrect standard adopted by the Court appellant was entitled to a new trial. Eleanor Cordero's testimony, had it been available to the defense, would have inducted a reasonable doubt in the minds of enough jurors to avoid a conviction. Not only does Eleanor Cordero completely exculpate the appellant, she also provides an additional reason for John Cordero courting the government's favor and she brands the government's chief witness a perjurer.

The Trial Court's review of the issues raised by appellant's motion papers leaves much to be desired. The court engaged in 'broken field' fact-finding. The Court by torturing Mrs. Cordero's averments drew unfounded and unreasonable conclusions. Appellant prays for independent review of the record by this Court. Ker v California, 374 U.S. 23, 34 (1963); Napue v Illinois, 360 U.S. 271.

The court's conclusion that on a retrial Eleanor Cordero's testimony would not produce a different verdict, flies in the face of the following statements by Eleanor Cordero:

1. The appellant had absolutely nothing to do whatsoever with any of the robberies.

2. Appellant did not provide any floor plans, getaway cars, nor did he share in the "split" of any of the robbery proceeds.
3. John Cordero, et al., concocted a story in which appellant was portrayed as the "mastermind" behind the robbery ring, in order to get favorable consideration at sentence.
4. As part of his deal with the government, John Cordero was able to excise his wife out of the case and have substituted in her place one Ann Massaneo.
5. The critical meeting where John Franzese allegedly took over the bank robbery operation did not occur. Parks and Smith were in Puerto Rico until at least the 19th of July and John and Eleanor Cordero were in Baltimore, Maryland until well after the 22nd of July.
6. As part of his deal with the government, John Cordero was able to get the \$10,000 returned to Eleanor Cordero, which was stolen from one of the robberies.
7. The incident involving the travelers checks occurred at a bar known as Wilsker's and was done in order to divert attention from the Queens area and had absolutely nothing to do with Franzese.

8. The argument over the "split" did not concern the appellant but concerned Eleanor Cordero and the bank robbers' efforts to cut Eleanor Cordero out of the proceeds.

9. Any role Ann Massaneo played at trial was in reality played by Eleanor Cordero.

At issue, is the credibility of the government's witnesses and objective facts that point in the direction of perjury. The appellant had the right to have the jury hear Mrs. Cordero's testimony. The jury had the right to consider such testimony. The government had an obligation not to let her remain mute in the face of their witnesses' own perjury. The government's case rested on little other than the testimony of the four confessed bank robbers. The testimony of the fifth - critical to the defense- was concealed.

Among other things, this case involves the government's suppression of information that vitally concerns the motivation of John Cordero's cooperation with the government. As part of the deal struck with the government, John Cordero was able to remove his wife from the case, and he was able to secure for her the return of some \$10,000, which were the actual proceeds of the two robberies. At trial, John Cordero testified that he said that his wife had driven one of the switch cars following the Oceanside robbery on August 13th,

although he stated that his wife had "innocently" participated in the robbery. Mr. Edelbaum, Mr. Franzese's lawyer at trial, argued to the jury in summation that despite all the denials, Mrs. Cordero was involved in the robbery (Trial Record, 3954-3955). It is readily apparent that faced with John Cordero's denials, Mr. Edelbaum had little success. The jury believed John Cordero's denials that it was not part of his deal with the government that his wife would get off scott free. In fact, this was not the true role of John Cordero's wife. It is now clear that part of his deal with the government for testifying against appellant was that their secret would be well kept.

The taint of John Cordero's false testimony was not erased because the untruthfulness may only have affected his credibility as a witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Napue v Illinois, 360 U.S. at 269. It was so here, the jury was squarely faced with the hard question of whom to believe. Had the source and substance of John Cordero's untruthfulness on direct examination have been disclosed and developed at trial, the appellant's fate would have most assuredly been decided differently.

E. The Government's Culpability:

The motion papers and the files of the records of the case conclusively show that the government knew that Ann

Massaneo was not a participant in the robberies and that Eleanor Cordero was. This highly significant fact could not, under any view of the record, have escaped the government's attention. It appears to be inescapable that any claim by the government that Eleanor Cordero's role was unknown, has to be the sheerist hypocrisy. The government will be hard-pressed to explain away the record facts that although Ann Massaneo, the alleged culprit, was indicted, her case was severed before trial, on consent of the government. Later, it was dismissed on motion of the government. (A-59-61) Although Ann Massaneo testified at the Polisi trial and declared her innocence under oath, she was never indicted or accused of perjury. Obviously, the government could not press the case against Ann Massaneo, without exposing the fraud they perpetrated on the court and jury at the Franzese trial.

The government's culpability is inescapable. No other explanation is available for the government's studied avoidance of the truth. No agent or United States Attorney ever bothered to ask Mrs. Cordero to explain her actions or even to say a word about her knowledge of the robberies. No agent or United States Attorney ever asked her to deny her participation in the robberies. This was despite the fact that on several occasions she met with Mr. Gillen, the United States Attorney prosecuting the case, at the United States Attorney's office, in the presence of her husband. (A-66-68) At least this

would have been blinding their eyes to the obvious. By the very circumstances of John Cordero becoming informant, Eleanor Cordero meeting John Cordero in Mr. Gillen's office day after day, they were no longer at arm's length. Certainly the government could have simply said to John Cordero, who insisted on his wife's release, "Alright, we will release her provided she's viewed by witnesses and we get a better explanation of her admitted role in the transaction."

Even after the wholesale substitution of Ann Massaneo was made, Mrs. Cordero was never asked to deny her involvement in the robberies, and much to her surprise and relief was never viewed by any eyewitnesses. (A-67) The government deliberately and systematically avoided every single opportunity to confront Mrs. Cordero, or to put her non-involvement to any test.

Mr. Justice Lang, of the New York Supreme Court, New York County, in the highly celebrated case of People v Maynard, 363 N.Y.S.2d 384 (1974), might well have been characterizing the action of the government herein when he stated in answer to the argument that the government just didn't know:

"To label such suppression intentional or negligent is unnecessary. It is enough that the prosecution was the active and effective cause of the non-disclosure of the evidence. If the prosecutor did not erect a barrier to the evidence it certainly enshrouded the information in fog. If such not be willful suppression, the result was a de facto suppression." 363 N.Y.S.2d at 380

H. Further Corroboration of Government's Knowledge and Culpability:

When Eleanor Cordero was arrested on October 1, 1965 at her home in Bethel, Connecticut, the government already had information from a "confidential informant" that Mrs. Cordero was involved in bank robberies and was the actual driver of the getaway car. Her daughter, Stephanie Cordero, was also in the house at the time of her mother's arrest. Eleanor Cordero was immediately taken to the hospital and Stephanie Cordero was driven to a foster home by two of the arresting agents. (A-66)

Stephanie Cordero, has submitted an affidavit in the court below, wherein she has stated that while she was in the car, being driven to the foster home, the government agents told her that her mother was a bank robber and that they knew all about Stephanie being kept in the back seat of the car during one of the robberies. (A-66, 69)

Additionally, at the time of Eleanor Cordero's arrest in her home in Bethel, Connecticut, the arresting agents took from her closet a distinctive black and white print dress. No other dress was taken from her home. The agents indicated to her that this was the dress that she was wearing during the robberies. That black and white dress was not worn by her during any of the robberies. It was worn only once, that being the time they went to Wilsker's to "dump" the travelers checks. (A-66)

CONCLUSION

The court below erred in denying appellant an evidentiary hearing. On their face, the affidavits of Eleanor Cordero were more than sufficient to require a new trial herein. She states in detailed affidavits that the government participated along with her husband in a scheme to have her removed from the case, have the stolen money returned to her, and have Ann Massaneo, for purposes of Franzese's trial, become her alter-ego. As subsequent events revealed Ann Massaneo was never prosecuted and several years later her case was quietly dismissed on the motion of the government. Mrs. Cordero states unequivocally that appellant did not in any way, manner, or form, participate, mastermind or share in any of the bank robberies which he was convicted and sentenced to fifty years.

The court, at a very minimum, should have granted appellant an evidentiary hearing. The court, in its memorandum and order, never discounted Mrs. Cordero's assertions. Instead, it applied an erroneous legal standard to determine whether appellant should have been accorded relief. The court circumvented appellant's right to a hearing by inviting the government to submit its evidence in affidavit form. Appellant asks that this entire matter be remanded to the District Court for an evidentiary hearing

in accordance with the established law of this circuit.

United States v Taylor, 487 F.2d 307 (1973).

Respectfully submitted,

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